(23,266)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 691.

LESTER P. BARTELL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

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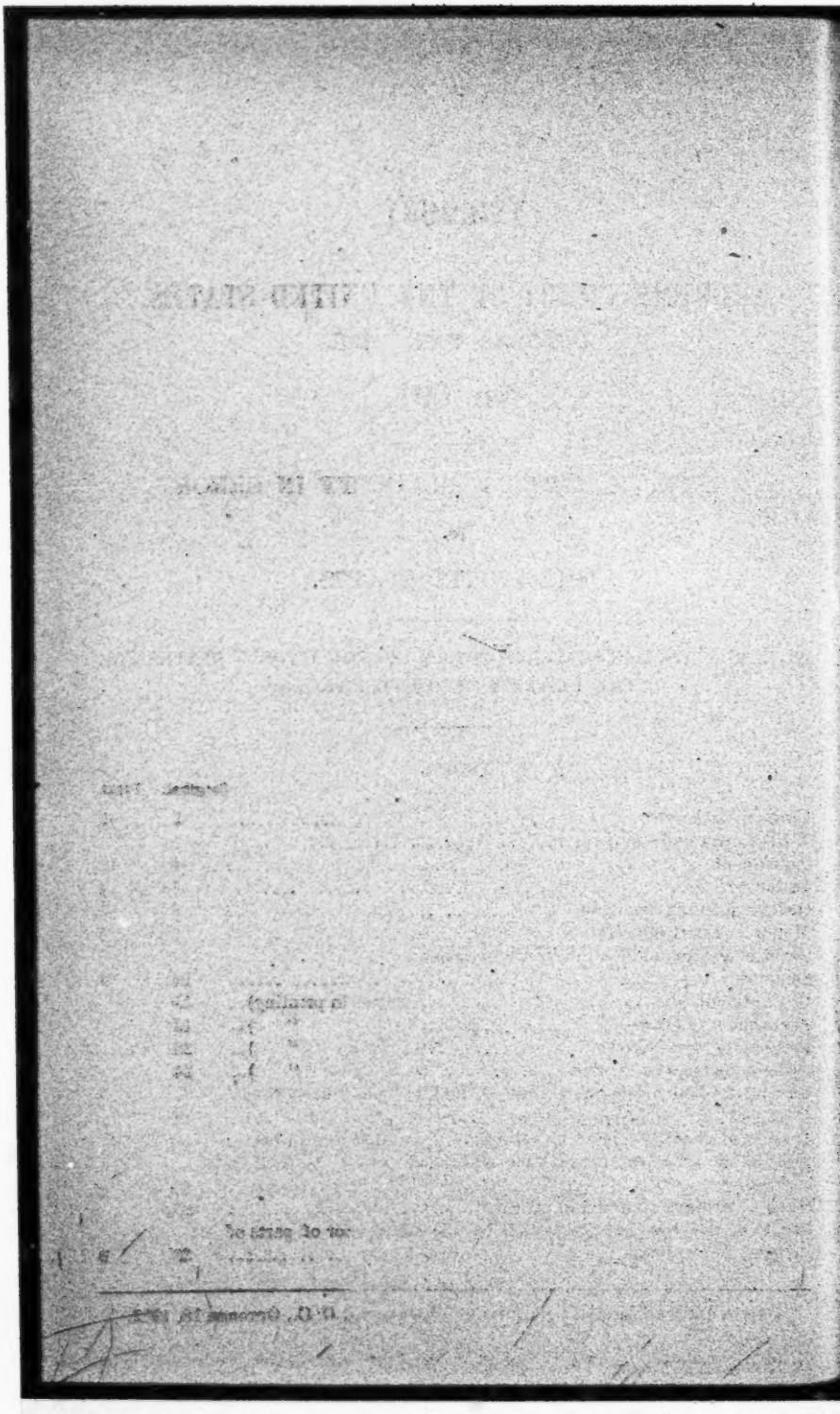
JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 18, 1912.



1 UNITED STATES OF AMERICA:

In Supreme Court.

LESTER P. BARTELL, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Citation.

The President of the United States of America to the United States of America and E. E. Wagner, District Attorney for the District of South Dakota, and G. W. Wickersham, Attorney General, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C. within sixty days from the date hereof pursuant to the writ of error filed in the clerk's office of the United States District Court in the District of South Dakota wherein the United States of America is defendant in error, and Lester P. Bartell is plaintiff in error, being a criminal action to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Done at the City of Sioux Falls in the District of South Dakota this 13 day of April, 1912.

JAMES D. ELLIOTT,
District Judge.

[Endorsed:] United States of America. In Supreme Court. Citation. Lester P. Bartell, Plaintiff in Error, vs. United States of America, Defendant in Error. Due personal & timely service of wi- admitted April 13th, 1912, at Sioux Falls, S. D. Edwin E. Wagner, United States Attorney, District of South Dakota. Filed April 13, 1912. Oliver S. Pendar.

2 UNITED STATES OF AMERICA:

In Supreme Court.

LESTER P. BARTELL, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Writ of Error.

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of South Dakota, Greeting:

Because in the record and proceeding, as also in [illegible]endition of the judgment of a plea which is in the said District Court before you,

between the United States, plaintiff, being the defendant in error herein, and Lester P. Bartell, defendant, being the plaintiff in error herein, a manifest error hath happened, to the great damage of the said defendant, Lester P. Bartell, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty days from date hereof, in said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct the
3 error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court this 13 day of April, in the year of our Lord One thousand nine hundred and twelve.

[U. S. Dist. Court Seal, Dist. of South Dakota, Sioux Falls.]

OLIVER S. PENDAR,
Clerk of the District Court of the U. S.
for the District of South Dakota.

Allowed by—

JAMES D. ELLIOTT,
District Judge.

[Endorsed:] United States of America. In Supreme Court. Writ of error. Lester P. Bartell, Plaintiff in Error, vs. United States of America, Defendant in Error. Filed April 13, 1912. Oliver S. Pendar, Clerk, by Odin R. Davis, Deputy.

UNITED STATES OF AMERICA,
District of South Dakota,
Southern Division, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Supreme Court, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of the District Court, at office in the city of Sioux Falls, this 5th day of June, A. D. 1912.

[U. S. Dist. Court Seal, Dist. of South Dakota, Sioux Falls.]

OLIVER S. PENDAR, *Clerk.*

4 The District Court of the United States of America for the Southern Division of the District of South Dakota in the Eighth Judicial Circuit.

At a Stated Term of the District Court of the United States of America for the Southern Division of the District of South Dakota, Begun and Held at the City of Sioux Falls, within and for the District and Circuit aforesaid, on the First Tuesday of April, in the Year of our Lord One Thousand Nine Hundred and Twelve.

The Grand Jurors of the United States of America, good and lawful men, summoned from the body of the District aforesaid, then and there being duly empaneled, sworn, and charged by the Court aforesaid, to diligently inquire and true presentment make for said District of South Dakota, in the name and by the authority of the United States of America, upon their oaths, do present:

That Lester P. Bartell, late of the County of Minnehaha, in said District heretofore, to-wit: on the twenty fourth day of November, in the year of our Lord one thousand nine hundred and eleven, with force and arms, at Sioux Falls, in the County of Minnehaha, State of South Dakota, in the district aforesaid, and within the exclusive jurisdiction of this Court, did then and there unlawfully, wilfully, knowingly and feloniously deposit, and cause to be deposited, for mailing in a postoffice of the United States of America, to-wit: the post office at Sioux Falls, in the County of Minnehaha, in the
5 State aforesaid, for mailing and delivery by the Post Office establishment of the United States of America, certain non-mailable matter, to-wit: a letter enclosed in an envelope, which said letter was then and there filthy, obscene, lewd, lascivious and of an indecent character, and is too filthy, obscene, lewd, offensive and of such indecent character as to be unfit to be set forth in this indictment and to be spread at length upon the records of this Honorable Court. Therefore the Grand Jurors, aforesaid, do not set forth the same in this indictment; and which said envelope containing said letter was then and there directed to and addressed as follows: Miss Zella Delleree, Stevens Point, Wis., he, the said Lester P. Bartell, then and there well knowing the contents of said letter and the character thereof, and well knowing the same to be filthy, obscene, lewd and lascivious and of an indecent character, contrary to the form, force and effect of the Statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America.

EDWARD E. WAGNER,
United States Attorney for the District of South Dakota.

Names of Witnesses sworn and examined before the Grand Jurors:
Vernon C. Batie,
C. E. Johnson,
Claude W. Eaglebarger.
Fred M. Sackett,
Fredracka C. Delleree.

6 (Endorsed:) No. 1503—In the District Court of the United States in and for the District of South Dakota, Southern Division—The United States vs. Lester P. Bartell—Indictment for Send- Obscene Letter through the Mail. Violation Sec. 211 New Penal Code—A True Bill. Ed. J. Miller, Foreman. Presented in open Court by the Foreman of the Grand Jury in the presence of the Grand Jury and filed as a record of this Court this 3rd day of April, A. D. 1912. Oliver S. Pendar, Clerk, by Odin R. Davis, Deputy—Edward E. Wagner, United States Attorney.

And, to-wit, on the same day there was filed in the office of the Clerk of said Court, Demurrer; which said Demurrer is in words and figures the following, to-wit:

7 In the District Court of the United States for the District of South Dakota.

UNITED STATES OF AMERICA, Plaintiff,
vs.
LESTER P. BARTELL, Defendant.

Demurrer.

Defendant demurs to the indictment in this action for the following reasons:

I. That the facts stated in said indictment are not sufficient to and do not constitute a crime.

II. That no facts are stated sufficient to notify this defendant of the nature and cause of the accusation for which he is now placed on trial, as required by Article IV of the Amendments to the Constitution of the United States.

Wherefore this defendant demands judgment that said indictment be dismissed and that he be granted his liberty.

JOE KIRBY,
Attorney for Defendant.

(Endorsed:) No. 1503. S. D.—United States District Court District of South Dakota, Southern Division—United States vs. Lester P. Bartell—Demurrer—Filed Apr. 3, 1912, Oliver S. Pendar, Clerk, by Odin R. Davis, Deputy.

And, to-wit, on the same day there was filed in the office of the clerk of said court, Order Overruling Demurrer; which said Order Overruling Demurrer is in words and figures the following, to-wit:

8 In the District Court of the United States for the District of South Dakota.

UNITED STATES OF AMERICA, Plaintiff,
vs.
LESTER P. BARTELL, Defendant.

Order Overruling Demurrer.

In this action the defendant having duly demurred to the indictment because the facts stated therein were not sufficient to and did not constitute a crime, and particularly because such indictment did not inform the defendant of the nature or cause of the accusation against him as required by Article VI of the Amendments to the Constitution of the United States, and after hearing and considering the issues presented by said demurrer, the Court being of the opinion that said indictment is sufficient under the law, Now Therefore,

It is ordered that said demurrer be and the same is hereby overruled and that trial upon said indictment proceed against said defendant.

Done at Sioux Falls, South Dakota, this 3rd day of April, 1912.

By the Court,

JAMES D. ELLIOTT, *Judge.*

Attest:

[SEAL OF COURT.]

OLIVER S. PENDAR, *Clerk.*

9 *Exception.*

To the making of the foregoing order the defendant then and there duly excepted, and said exception is hereby settled.

JAMES D. ELLIOTT, *Judge.*

(Endorsed:) 1503. S. D.—United States vs. Lester P. Bartell—Order Overruling Demurrer—Filed April 13, 1912, Oliver S. Pendar, Clerk.

And afterwards, to-wit, on the 13th day of April, A. D. 1912, there was filed in the office of the Clerk of said Court, Motion for Arrest of Judgment; which said Motion for Arrest of Judgment is in words and figures the following, to-wit:

In the District Court of the United States for the District of South Dakota.

UNITED STATES OF AMERICA, Plaintiff,
vs.
LESTER P. BARTELL, Defendant.

Motion for Arrest of Judgment.

Now comes the defendant, Lester P. Bartell, and respectfully moves the Court that no judgment go against him and that no sentence be passed on the verdict which has been rendered in this action, but that judgment in this action be arrested and this defendant granted his liberty for the following reasons:

10 I. That the facts stated in the indictment are not sufficient to and do not constitute a crime against the laws of the United States.

II. That said indictment does not inform this defendant of the nature and cause of the accusation presented against him, as required by Article VI of the Amendments to the Constitution of the United States, and particularly as follows:

(*a*) That there is nothing in said indictment which indicates or describes the letter which is alleged to contain non-mailable matter.

(*b*) That there is nothing in said indictment which would enable the Trial Court to determine that the letter offered in evidence upon the trial of this case was the same one which was presented to the grand jury and upon which the grand jury returned the indictment.

(*c*) That there is nothing in said indictment that would enable the Trial Court to determine that defendant was tried for the same matter for which the grand jury returned his indictment.

(*d*) That the indictment is so indefinite and uncertain as not to apprise the defendant of the matters for which he was to be tried, and enable him to prepare his defense.

Wherefore this defendant asks that judgment do not go against him but that he be restored to his liberty.

JOE KIRBY,
Attorney for Defendant.

11 (Endorsed:) 1503. So. Div.—In the District Court of the United States for the District of South Dakota—Motion for Arrest of Judgment—United States of America, Plaintiff, vs. Lester P. Bartell, Defendant—Filed April 13, 1912, Oliver S. Pendar, Clerk.

And, to-wit on the same day there was filed in the office of the clerk of said court, Order Overruling Motion in Arrest of Judgment; which said Order is in words and figures the following, to-wit:

In the District Court of the United States for the District of South Dakota.

UNITED STATES OF AMERICA, Plaintiff,
vs.
LESTER P. BARTELL, Defendant.

Order.

In the above entitled action the defendant having duly presented his motion in arrest of judgment, and good cause for this order appearing,

It is ordered that said motion be, and the same is hereby overruled.

12 Done at Sioux Falls, this 13th day of April, 1912.

By the Court:

JAMES D. ELLIOTT, *Judge.*

To the above ruling the defendant then and there duly excepted and said exception is hereby settled.

JAMES D. ELLIOTT, *Judge.*

[SEAL OF COURT.]

Attest:

OLIVER S. PENDAR, *Clerk.*

(Endorsed:) In the District Court of the United States for the District of South Dakota—United States of America, Plaintiff, vs. Lester P. Bartell, Defendant—Order Overruling Motion in Arrest of Judgment—Filed April 13, 1912, Oliver S. Pendar, Clerk.

And, to-wit, on the same day there was entered and appears of record in Journal "V," Southern Division of said Court, Sentence of said Defendant; which said Sentence is in words and figures the following, to-wit:

13 UNITED STATES OF AMERICA,
District of South Dakota:

Within the Eighth Judicial Circuit of the United States.

In the District Court of the United States of America for the District of South Dakota, April Term, A. D. 1912.

Present, Hon. James D. Elliott, Presiding Judge of said Court.

Indictment No. 1503, So. Div.

THE UNITED STATES
vs.
LESTER P. BARTELL.

Convicted of the Crime of Unlawfully Depositing and Causing to be Deposited for Mailing in the Post Office of the United States an Obscene Letter.

Now on this the 13th day of April, A. D. 1912, the United States District Attorney and the above named defendant, Lester P. Bartell, with his counsel, came into Court, and this being the day fixed by the Court for pronouncing judgment upon the conviction of the crime of unlawfully depositing and causing to be deposited for mailing in the Post Office of the United States an obscene letter, as charged in the indictment, the said defendant is now asked by the Court if he has any legal cause to show why the judgment of the law upon said conviction should not be pronounced against him. And the said defendant now answers that he has no cause to show, and the said defendant having been duly convicted of the crime of unlawfully depositing and causing to be deposited for mailing in the Post Office of the United States an obscene letter, in said United States District Court for the District of South Dakota;

It is now by the court here considered, ordered and adjudged and the sentence of the Court is, that you, Lester P. Bartell, be imprisoned in the United States Penitentiary, situated at Leavenworth, in the State of Kansas, for and during the term or period of
14–37 five years, there to be kept, fed and clothed according to the laws regulating said prison, and while so confined you shall be exclusively under the control of the officer or officers having lawful charge of said prison;

And that you pay as a fine to the United States the sum of Five Thousand Dollars; and the costs of prosecution taxed in the sum of Two Hundred Thirty-three Dollars and Seventeen Cents, and that you stand committed to said Penitentiary until this sentence be complied with.

* * * * * * *

38 UNITED STATES OF AMERICA:

In Supreme Court.

LESTER P. BARTELL, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Statement of Errors, etc.

To the Honorable Clerk of said Court, Honorable Attorney General, and Honorable Solicitor General:

SIRS: Please take notice that the Plaintiff in Error intends to rely on the following errors claimed by him to have been committed upon the trial of this action as follows:

I. In overruling this Plaintiff in Error's demurrer to the indictment filed herein for the following reasons:

(*a*) That the indictment does not inform this Plaintiff in Error of the nature and cause of the accusation against him with sufficient definiteness and certainty to enable him to prepare his defense in said action, and the placing of Plaintiff in Error on trial on such indictment and overruling the demurrer to the same deprived him of his constitutional rights, particularly under the Sixth Amendment to the constitution of the United States.

(*b*) That the said indictment in no manner identifies the nonmailable letter which was before the grand jury and on which they desired to return an indictment, and this Plaintiff in Error has no means of knowing whether the grand jury have ever desired to indict him for the letter introduced in evidence upon

39 the trial.

(*c*) That there is no identity of the charge made by the grand jury with the accusation presented by the evidence on the trial.

II. The Trial Court erred in overruling this Plaintiff in Error's motion for arrest of judgment because no indictment was returned against him, charging him with the commission of any public offense or crime, and that said indictment in no manner informed him of the nature or cause of the accusation against him, as will more fully appear by the first assignment of error above set forth.

III. The Court erred in receiving the verdict of the jury, finding this Plaintiff in Error guilty.

IV. The Court erred in rendering judgment on said verdict against this Plaintiff in Error and sentencing this Plaintiff in Error to fine and imprisonment as appears by said judgment.

You are further notified that the said Plaintiff in Error thinks it necessary and requests that the following parts of the record be printed for use of the Supreme Court, to-wit:

(1) Indictment.
(2) Demurrer to Indictment.
(3) Order Overruling Demurrer with Exception thereto.
(4) Sentence and Judgment.

(5) Motion in Arrest of Judgment.
(6) Order Overruling Motion in Arrest of Judgment, with Exceptions thereto.
(7) Writ of Error.
(8) Citation.
(9) Statement of Errors.

JOE KIRBY,
Attorney for Plaintiff in Error Lester P. Bartell,
Sioux Falls, South Dakota.

40 [Endorsed:] 691/23266. United States of America. In Supreme Court. Lester P. Bartell, Plaintiff in Error, vs. United States of America, Defendant in Error. Statement of Errors, etc. Due, timely and personal service admitted on the within this 29th day of June, 1912. F. W. Lehmann, Solicitor General.

41 [Endorsed:] File No. 23,266. Supreme Court U. S. October Term, 1911. Term No. 691. Lester P. Bartell, Pl'ff in Error, vs. United States of America. Statement of errors and designation by plaintiff in error of parts of record to be printed and proof of service of same. Filed July 5, 1912.

Endorsed on cover: File No. 23,266. South Dakota D. C. U S. Term No. 691. Lester P. Bartell, plaintiff in error, vs. The United States. Filed June 22d, 1912. File No. 23,266.

MOTION OF PLAINTIFF IN ERROR TO ADVANCE

IN SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 691.

LESTER P. RAPTELL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

JOE KIRBY,
Attorney for Plaintiff in Error,
Rapid City, S. D.

MOTION OF PLAINTIFF IN ERROR TO ADVANCE

IN SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 691.

LESTER P. BARTELL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

MOTION TO ADVANCE.

Now comes the plaintiff in error, Lester P. Bartell, and moves this Honorable Court that this case be advanced for argument, and that the same be heard at the earliest possible moment for the following reasons:—

I. That on the 13th day of April, 1912 this plaintiff in error was by the United States District Court for the District of South Dakota, sentenced to five years imprisonment in the United States penitentiary at Leavenworth, and also sentenced that he pay a fine of Five thousand ($5000) dollars and costs of the prosecution, taxed at Two hundred and thirty-three and and 17-100 ($233.17) dollars.

II. That thereafter on the 13th day of April, 1912, this plaintiff in error procured a writ of error from this court to said trial court, and thereupon, the record, in obedience to said

writ, has been forwarded to this court and has been printed by the clerk and is now on file.

III. That the said trial court, on said writ of error being issued and served, did order the said Lester P. Bartell admitted to bail in the sum of Five thousand ($5000) dollars, but that owing to the poverty of said Lester P. Bartell, he has been unable to furnish such bail and was thereupon immediately taken under said judgment to the United States penitentiary at Leavenworth, Kansas, where he is now confined and serving sentence thereunder.

IV. That plaintiff in error is advised and believes that said case would not be reached for trial in the ordinary course of events, as the same now appears on the docket, for about two years, during all which time, if the objections to the records as presented by this writ are well taken, he will be wrongfully confined.

WHEREFORE, he prays that this Honorable Court advance said case as herein sought.

.....

Attorney and of Counsel for Plaintiff in Error.

NOTICE OF HEARING OF MOTION.

TO THE HONORABLE ATTORNEY GENERAL, SOLICITOR GENERAL and the UNITED STATES ATTORNEY FOR THE DISTRICT OF SOUTH DAKOTA:

SIRS:—Please take notice that at the opening of the Supreme Court at the City of Washington, D. C., at its court room on the 2nd day of December, 1912, or as soon thereafter as counsel can be heard on that or any succeeding day, the plaintiff in error will present the foregoing motion to said court.

JOE KIRBY,

Attorney for Plaintiff in Error,

Sioux Falls, S. D.

BRIEF OF PLAINTIFF IN ERROR

IN SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 691.

LESTER P. BARTELL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

JOE KIRBY,
Attorney for Plaintiff in Error,
Sioux Falls, S. D.

BRIEF OF PLAINTIFF IN ERROR

IN SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 691.

LESTER P. BARTELL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

STATEMENT.

The plaintiff in error, being the defendant in the trial court, and which I will so call him herein, was indicted for misuse of the mails, which indictment, omitting the formal part, is as follows:—(Record p. 3.)

"To-wit, a letter enclosed in an envelope which said letter was then and there filthy, obscene, lewd, lascivious and of an indecent character, and is too filthy, obscene, lewd and offensive, and of such indecent character as to be unfit to be set forth in this indictment, and to be spread at length upon the records of this Honorable Court, and therefore the grand jurors aforesaid do not set forth the same in this indictment, and which said envelope containing said letter was then and there directed to and addressed as follows:—Miss Zella Delleree, Steven's Point, Wisconsin."

To this indictment the defendant interposed a demurrer because it does not charge a crime, and that no facts are stated

to notify the defendant of the nature and cause of the accusation as required by Article VI of the Amendments of the Constitution of the United States. The demurrer having been overruled and exception saved, the defendant was found, guilty. (Record p. 6). A motion in arrest of judgment was interposed for substantially the same reasons as the demurrer, but more explanatory in detail, which motion, having been overruled and exception saved, defendant was sentenced (Record p. 8) to five years in the penitentiary at Leavenworth where, being unable to give bail, he is now found.

Writ of error having been regularly sued out, the matter comes here for review.

SPECIFICATIONS OF ERRORS.

Defendant particularly specifies the following reasons why the action of the trial court in overruling this defendant's demurrer to the indictment, and likewise refusing to sustain the motion in arrest of judgment, should be reversed.

I. That the facts stated in the indictment are not sufficient to and do not constitute a crime against the laws of the United States.

II. That said indictment does not inform the defendant of the nature and cause of the accusation presented against him as required by Article VI of the Amendments to the Constitution of the United States, and particularly as follows:—

(a) That there is nothing in said indictment which indicates or describes the letter which is alleged to contain nonmailable matter.

(b) That such indictment contains no statement of fact from which either the trial court or this court could determine that the defendant had ever committed an offense, but is limited to a series of conclusions and deductions on the part of the grand jury. Sufficient must appear in the record so that the trial court can say the letter is of such a character that the law places a ban thereon. This cannot be left to the grand jury to determine by simply saying that it was obscene and filthy.

(c) That there is nothing in said indictment which would enable the trial court to determine that such letter as the prosecution saw fit to offer in evidence on the trial of the case, was the same one which was presented to the grand jury and upon which the grand jury saw fit to return the indictment, not being described by either date, address, identifying marks or otherwise.

(d) That there is nothing on the record to indicate that the judgment convicting the defendant was based on the letter sought to have been alleged as mailed, in the indictment.

(e) There is nothing in said indictment that would enable the trial court to determine that the defendant was tried for the same matter for which the grand jury intended to return its indictment.

(f) That the indictment is so indefinite and uncertain as not to apprise the defendant of the matter for which he was to be tried, and to enable him to prepare his defense, while such indictment and conviction, are likewise so indefinite that he could never protect himself by pleading such conviction in bar on a second prosecution by the government for the same offense.

III. In overruling defendants motion in arrest of judgment and passing sentence on him.

ARGUMENT.

It is the intention of the writer of this brief to be present and present an oral argument when the case is reached, but I realize that sometimes "The best laid plans of mice and men," etc.

Article V of the Amendments to the Constitution provides:—"No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, * * * * * nor be deprived of life, liberty or property without due process of law," while Article VI, along the same line, continues--"In all criminal prosecutions the accused shall enjoy the right * * * * to be informed of the nature and cause of the accusation."

I take it to meet those constitutional requirements at least three conditions must be observed.

(1) The indictment must inform the accused of the charge with the definiteness and certainty recognized by law at the time this provision was adopted into the Constitution.

(2) It must be sufficient to protect, by the record, the defendant from a second jeopardy for the same offense.

(3) The defendant must be tried for the offense, and that alone, of which the grand jury saw fit to accuse him. It cannot be a blanket indictment so that the prosecuting officer can

select from a series of offenses, where only one is presented in the indictment, which he will attempt to prove.

Does the indictment in this respect meet the requirements of this constitutional provision? I think not.

I believe no contention will be made by the prosecution but what the defendant must be tried, if at all, for the same specific offense that the grand jury had in mind when they returned the indictment, and this must appear from the record and cannot be left to the sense of honesty of the prosecution, or the honor of any court official.

In re. Bain, 121 *U. S.* 1.

In the *Bain case* the defendant after conviction and imprisonment, was discharged by this court on habeas corpus because no valid indictment was found against him. True, an indictment was returned against Bain (the cashier of a national bank), accusing him of having made a false report with intent to deceive the *Comptroller of Currency*. The trial court believing that the words "Comptroller of Currency" were surplusage, struck out the same and compelled the accused to stand trial on the indictment thus revamped. This Court, in discharging him, said:

> "It is never to be forgotten that in the construction of the language of the Constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument. * * * We are of the opinion that an indictment found by the grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged."

A little further ahead in the same decision we find the following language:

> "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common-law attaches to an indictment by grand jury, as a prerequisite to a prisoner's trial for crime, and without which the Constitution says, 'No person shall be held to answer' may be frittered away until its value is almost destroyed."

Again, in the closing part of this opinion I find the following:—

> "It is of no avail under such circumstances to say that the court still has jurisdiction of the person and of the crime, for though it has possession of the person, and would have jurisdiction of the crime if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer,' he is then entitled to discharge as far as the offense originally presented to the court by indictment is concerned."

I think then, as I stated above, it can hardly be urged that if, as appears in the *Bain case*, the defendant must be tried on a valid indictment returned by the grand jury, that indictment must show an offense so described that the trial court will know he is being tried upon the one on which the grand jury acted, and no other. So much for the identification of the trial with the offense before the grand jury.

Then further, under Article VI of the Amendments to the Constitution, this indictment must inform him "of the nature and cause of the accusation," and this information must be so definite as to contain every ingredient of which the crime is composed so that he may be able, with his witnesses, to combat the prosecution at every point and, when the case is concluded, to invoke the protection provided by Article V against being again placed in jeopardy for the same offense.

U. S. v. Cruikshank, 92 *U. S.* 542.

In the *Cruikshank case* an attempt was made, as in the case at bar, to present an indictment in the words of the statute which, in that case, was against banding together "to injure, oppress, threaten or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States."

In passing on this, Chief Justice Waite said:

> "In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In U. S. v. Mills 7. Pet. 142, this

was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged;' and in U. S. v. Cook, 17 Wall. 174 that 'Every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principal of criminal pleading, that where the definition of an offense, whether it be at common-law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species. It must descend to particulars, I, Arch. Cr. Pr. & Pl. 291. The object of the indictment is first, to furnish the accused with such description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged so that it may be decided whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

A long period of comparative quiet and good will among our people, has caused many to forget the oppressions which resulted in the adoption of the constitutional protections of the rights of the individual citizen as found in the "bills of rights" until we almost wonder if our people are not tired of their liberties and anxious to have the protection of the individual against the masses effaced. It is a pleasure to know that our courts are doing all in their power to protect such thoughtless acts and purposes from having their legitimate effect.

The legislature of the State of Missouri, in common with many other states, has attempted to furnish prosecuting officers with a short form of indictment.

State v. Terry, 19 *S. W.* 206.

In this case the court in no uncertain terms, quoting from many authorities, including the *Cruikshank case,* holds such legislation void, saying:—

"We are thoroughly satisfied that if that case (a former decision of the court), is still to stand for law,

then section 22 of the Bill of Rights respecting the nature and cause, etc., must fail."

The decision is too long to permit quoting here, and too full of meat to justify division. I will ask you to read it.

Knowlton vs. Moore, 178 *U. S.* 95.

In the case at bar we think the words of Justice White in the *Knowlton case* are applicable:—

> "The necessities which gave birth to the constitution, the controversies which preceded its foundation and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the constitution in order thereby to be enabled to correctly interpret its meaning."

Rosen vs. U. S., 161 *U. S.* 29.

In the *Rosen case,* which was an indictment, as in the case at bar, for misuse of the mails, the indictment is set forth in the opinion rendered by Justice Harlan which, after the allegations of mailing and the deduction of the grand jury that it was obscene, lewd and lascivious, continues:—

> "On the first page thereof was entitled 'Tenderloin, No. Broadway' and on the same page were printed the words and figures following, that is to say, 'Vol. II No. 27, Trade Mark 1892, by Lew Rosen, New York, Saturday, April 15, 1893, ten cents a copy, Four dollars a year in advance' and thereupon on the same page is the picture of a cab, horse, driver and the figure of a female, together (underneath the said picture) with the word 'tenderloineuse,' and the said paper consists of twelve pages, minute descriptions of which, with the pictures therein and thereon, would be offensive to the court and improper to spread upon the records of the court because of their obscene, lewd and indecent matters."

At this place, after having quoted as above from the indictment in the Rosen case, I call your attention to the indictment in the present case, the whole of the charging part of which will be found in the front of this brief, and contains no statement whatever in any manner attempting to identify the alleged obscene letter unless it be that the envelope was addressed to a certain party.

I take it that in sustaining the indictment against Rosen this court went to the extreme limit allowed by the Constitution, Mr. Justice White and Mr. Justice Shiras dissenting.

It will be noted how different the case at bar from the *Rosen case,* which at least gave the defendant and the court quite numerous identifying marks and description of the objectionable document. Still in the *Rosen case* the dissenting jurists quote with approval from Grimm v. U. S. 156 U. S. 604, as follows:—

> "It is enough to so far describe it (obscene matter) that its obnoxious character may be discerned." The learned Justice continues: "The reason which exacted this reference was declared to be both for identification of the offense, and to enable the court to determine whether the matter was objectionable, and therefore non-mailable. * * * * It is unquestionable that a grand jury must find an indictment in order that the prosecution be valid. How can it be said that there has been such a presentment when on the very face of the record it is absolutely impossible to determine what matter the grand jury charged to be obscene? To say that it can be supplied by a bill of particulars, or otherwise, is a misconception, for it becomes impossible to supply that which does not legally exist. The Constitution requiring that the grand jury should find the indictment, neither the court, the prosecuting officer, nor anyone else has power to create the necessary averments to make that an indictment which otherwise would be no indictment at all. This case illustrates the danger of departing from constitutional safe-guards. To this rule there has been evolved an exception. This exception, as we have said, is that where the publication or mailing of obscene matter is charged by the grand jury, such matter need not be stated in the indictment, provided, in that instrument it be *referred to and identified.* Under the ruling now announced it seems to us that the exception is made to destroy the rule."

I think it will not be urged that the date of the alleged offense, as set forth in the indictment, is in any manner an identification of the objectionable document which was presented to the grand jury. In fact, the trial judge once aptly remarked to me that the date was wholly immaterial so long as the time sought to be proven was within the statute of limitations.

U. S. v. Potter, 56 *Fed. Rep.* 95.

In the *Potter case* the circuit court for the district of Massachusetts in 1892 said:

> "On principal, allegations of time in criminal pleadings ought to be made with approximate accuracy; yet, by authority of a practice which has now continued so long that it must be yielded to, time need not be proved as stated and these allegations touching it are the most useless portions of criminal pleadings. * * * * Yet, as a general rule, statements of time may be so far varied from by the proofs that Judge Lowell, in U. S. v. Jackson, 2 Fed. Rep. 502, and Bish. Crim. Proc. (3d Ed.) Sec. 386, regard them as so wholly formal that they may be dispensed with under the Rev. St. Sec. 1025."

The only other thing in the indictment in the case at bar is the statement that the envelope containing the letter was addressed "Miss Zella Delleree, Steven's Point, Wisconsin." This might be some possible identification of the envelope, but it would seem if it were in the mails something more definite could appear. Was it stamped, post marked, or otherwise distinguishable? But how would this in any manner indentify the letter that is said to have been objectionable. It must be true that some part of the letter was not too filthy for to appear on the records of the Court. It is reasonable to assume that at least so much of a description of the document as is found in the Rosen case could have been presented.

Again, what was there before the Court that would allow it to determine from inspection whether the objectionable document was such as, if mailed by the defendant, rendered him answerable to the law? Can the grand jury be allowed to usurp the functions of the court in this regard?

Again, how are we to know that the document ultimately presented to the trial court was the one that was before the grand jury? It seems to me, to hold such an indictment good, is for all practical purposes to abolish the constitutional safeguards. If they can be torn down in this case they can be destroyed in any other, and blanket indictments would probably become the rule.

The writer has no patience with the hypocrisy which evidences itself in declarations of mock modesty, and believes it should not be encouraged by the courts. To say that a letter

presented to a grand jury of American citizens of supposedly ordinary intelligence is too obscene for them to copy into their indictment when they must read the article at least once(and many of them will several times if opportunity offers), before they find the indictment, is not in accordance with my way of thinking.

Again, such document must be presented in its fullness upon the trial and then read by the prosecution in open court. If exceptions thereto are presented, it must be copied in full, or such parts as are deemed material, (being the objectionable parts), into the bill of exceptions. If the case reaches an appellate tribunal this must be again copied and a transcript forwarded, and finally it must be printed in the transcript of the record of this court, which is finally bound into volumes for permanent use. To say then, that a publication is too filthy to be spread on the records of the court by a grand jury, but is clean enough to be read to the jury and the trial judge before the mixed audience which fills our court rooms, and finally is good enough to be printed in the records of this court, is giving the individual grand jurors an aesthetic halo which the writer from experience knows they do not deserve.

A mistake, in the opinion of the writer, was made when we deviated from the English procedure of requiring documents to be set forth in the indictment so the court and not the grand jury can pass on their sufficiency, and determine whether or not the defendant must answer thereto. I like the words of Justice Bradley as found in the case of *Boyd vs. U. S.* 116 *U. S.* 616-35, in which he said:

> "Illegitimate and unconstitutional practices get their first footings in that way, viz:—by silent approaches and slight deviations from legal mode of procedure. This can be only obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close literal construction deprives them of half their sufficiency and leads to gradual depreciation of the right as if it consisted more in sound than in subsubstance. It is the duty of the courts to be watchful for the constitutional rights of the citizens against any stealthy encroachment thereon. Their motto should be *obsta principiis.*"

U. S. v. Harmon, 34 *Fed. Rep.* 872.

The *Harmon case* was one where the objectionable matter

was described in the indictment by the name of the newspaper, and then with that delicate sense of propriety which grand jurors alone seem to possess, they informed the court the publication was too obscene to be spread upon the record. In passing on the sufficiency of such indictment, the Court said:

> "It is not sufficient for the grand jury to allege that the contents of the paper are too obscene to be spread upon their records, and omit every means of identification. Surely the objectionable matter can be described or identified in some manner without giving offense to the court or defiling its records with scandalous and indecent matter. The date of the paper, the title of the article, or its general tenor and purport, couched in decent language, will serve to make the charge definite and certain. The demurrer to the indictment must be sustained."

U. S. v. Read, 73 *Fed. Rep.* 289.

In the *Read case*, after claiming that it is not necessary to set forth the objectionable article *totidem verbis*, the court said:

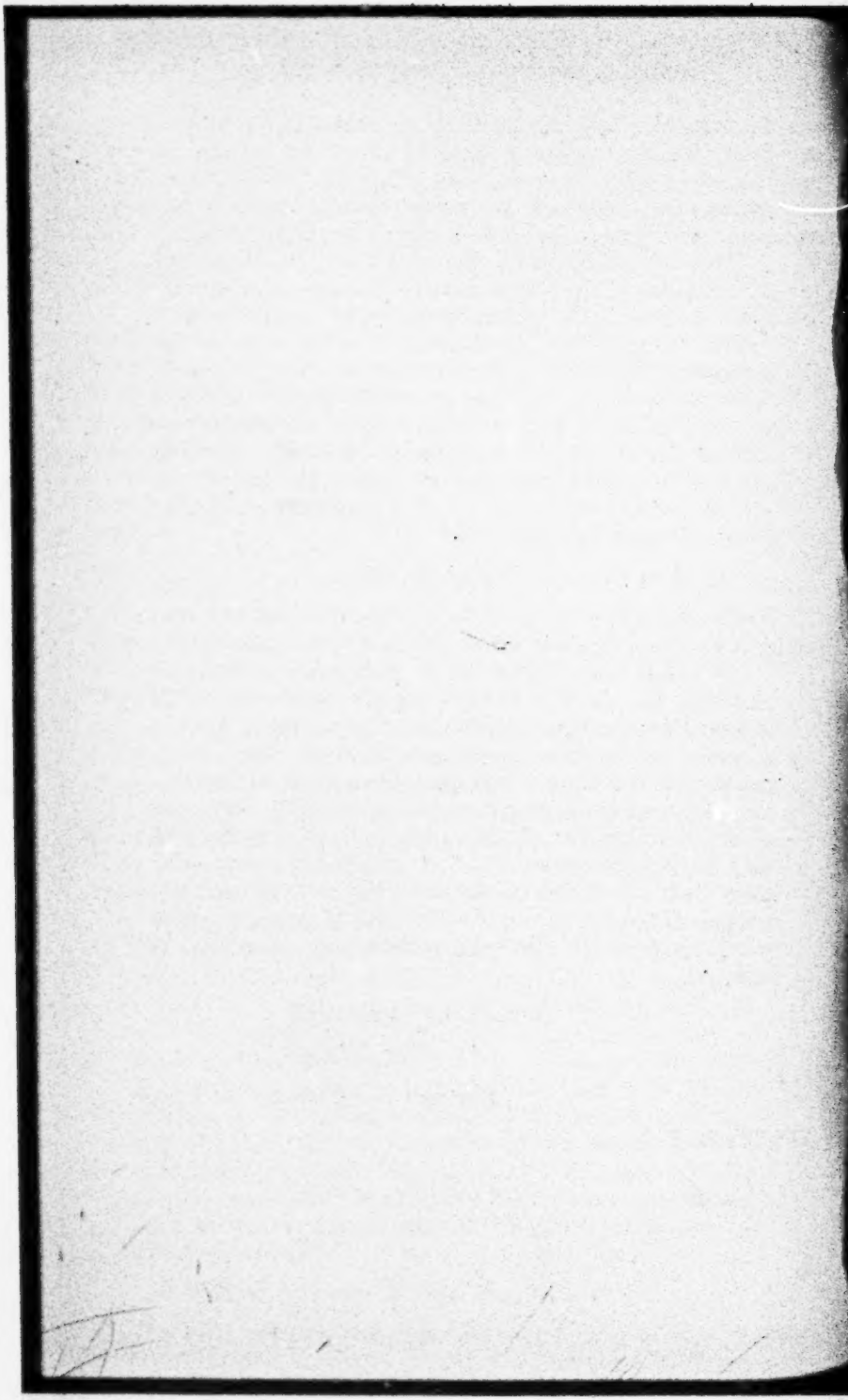
> "This has been held to be a permissible mode of pleading, but the law of pleading requires that if this is done there should be sufficient else stated in the indictment to describe the thing alleged to have been mailed and distinguish it from other matter so that the respondent may be apprised with reasonable certainty of the identification of the matter which he is charged with having deposited. * * * Certainly there could have been no defect in stating what newspapers the defendant deposited, or of what date of issue, or what was the caption, or other characteristic of the offensive article."

Respectfully submitted,

JOE KIRBY,

Attorney for Plaintiff in Error,

Sioux Falls, S. D.



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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 691.

LESTER P. BARTELL, *Plaintiff in Error,*

v.

THE UNITED STATES, *Defendant in Error.*

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

BRIEF FOR THE UNITED STATES.

The defendant, Bartell, was indicted, convicted, and sentenced to five years' imprisonment and to pay a $5,000 fine for sending an obscene letter through the mails. (R. 3, 8.)[1]

The indictment alleges that on November 24, 1911, at Sioux Falls, South Dakota, the defendant mailed (R. 3)—

> a letter enclosed in an envelope, which said letter was then and there filthy, obscene,

[1] The severity of the punishment is convincing evidence of the peculiarly flagrant nature of his offense, without turning to the typewritten transcript to learn of the great wrong he did a young girl, which fully explains why his counsel omits from the printing practically everything except the bare indictment.

lewd, lascivious and of an indecent character, and is too filthy, obscene, lewd, offensive, and of such indecent character as to be unfit to be set forth in this indictment and to be spread at length upon the records of this Honorable Court. Therefore the Grand Jurors aforesaid, do not set forth the same in this indictment; and which said envelope containing said letter was then and there directed to and addressed as follows: Miss Zella Delleree, Stevens Point, Wis.

The sole ground relied on for reversal is that the indictment did not sufficiently set out or identify the letter complained of, and therefore did not inform the defendant of the nature and cause of the accusation. (Constitution, Amendment VI.)

There is no pretense that in point of fact the defendant had any doubt as to what particular letter he was charged with sending. There is no pretense that he was tried on a different letter from that presented to the grand jury. But the sufficiency of the indictment is attacked on the theoretical ground that such things are possible under the alleged vagueness of the indictment's terms.

The objection raised must be met squarely; but as it is purely one of principle (with no element of practical application in the case at bar), the defendant has not in fact been injured, and the case should not be reversed unless a fundamental right has been violated.

ARGUMENT.

In *Rosen* v. *United States*, 161 U. S. 29, 34, 40, it is said:

> A defendant is informed of the nature and cause of the accusation against him if the indictment contains such description of the offence charged as will enable him to make his defence and to plead the judgment in bar of any further prosecution for the same crime.
>
> Does the indictment in this case meet these requirements?
>
> It describes the paper alleged to be obscene, lewd, and lascivious with such minuteness as to leave no possible doubt as to its identity. If the defendant did not have in his possession or could not procure a duplicate of such paper, he could have applied to the court for an order that he be furnished with a bill of particulars to the end that he might properly defend himself at the trial. *United States* v. *Bennett*, 16 Blatchford, 338, 351; *Rex* v. *Hodgson*, 3 Car. & P. 422; Wharton's Cr. Pl. & Pr. sec. 702. He made no such application but went to trial without suggesting that he was not sufficiently informed by the indictment of the nature and cause of the accusation against him. When the paper in question was produced in evidence he made no objection to it as not being sufficiently described in the indictment * * * .
>
> The doctrine to be deduced from the American cases is that the constitutional right of the defendant to be informed of the nature

and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and, after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defence and protect himself after judgment against another prosecution for the same offence; that this right is not infringed by the omission from the indictment of indecent and obscene matter, alleged as not proper to be spread upon the records of the court, provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him; and that, in such case, the accused may apply to the court before the trial is entered upon for a bill of particulars, showing what parts of the paper would be relied on by the prosecution as being obscene, lewd, and lascivious, which motion will be granted or refused, as the court, in the exercise of a sound legal discretion, may find necessary to the ends of justice.

It is therefore settled law that no part of the obscene matter need be set out in the indictment.

1. As the letter itself is not required to be set out in the indictment, was it sufficiently identified to enable the defendant to make his defense?

It is described as having been mailed at a certain place, on a certain day, inclosed in an envelope, addressed to "Miss Zella Delleree, Stevens Point, Wis." In view of the special rule that obtains as

to describing obscene matter too filthy to be spread at large in the indictment, no precise method has been prescribed as to identifying that which is too filthy to be described, and so the practice varies in different circuits and according to the circumstances of each particular case.

Sometimes the date of the letter is given (but often letters are not dated), or the opening and concluding words of the paper, or a mark of identification of some kind. In the Eighth Circuit the practice seems to be merely to refer to the address on the envelope. For example, in *Tubbs* v. *United States*, 105 F. R. 59, 60, an indictment for sending an obscene letter through the mails merely described the letter as being a "letter inclosed in an envelope" and "which said envelope containing the letter aforesaid was then and there directed to and addressed as follows, that is to say, 'Miss Clara Saltness, Alcester, S. D.,'" and the indictment was held good against the same objection now raised, the Circuit Court of Appeals saying (p. 61):

> Defendants in this class of cases commonly affect ignorance of what they are indicted for, and great apprehension lest they shall be indicted a second time for the very same offense, and be unable to prove by the record a former conviction or acquittal. No case of the kind has ever occurred, or is ever likely to occur, but the affected apprehension of each defendant that it may occur in his case is perennial. The supreme court has put a quietus on these stock objections by repeatedly pointing out

that the defendant may apply for a bill of particulars (*Rosen* v. *U. S.*, 161 U. S. 29, 34, 35, 39–41, *Durland* v. *U. S.*, 161 U. S. 306, 315), and that parol evidence is always admissible, and sometimes necessary, to establish the defense of prior conviction or acquittal (*Dunbar* v. *U. S.*, 156 U. S. 185, 191, *Durland* v. *U. S.*, 161 U. S. 306, 314, 315).

2. The defendant here renews the same old objection that the letter was not so described as to protect him from a second jeopardy for the same offense. Parol evidence is always admissible and often necessary to establish the defense of prior conviction or acquittal. (*Durland* v. *United States*, 161 U. S. 315; *Dunbar* v. *United States*, 156 U. S. 185, 191; *Tubbs* v. *United States*, 105 F. R. 59; *Bowers* v. *United States*, 148 F. R. 379.)

Therefore the defendant could always show by parol what letter was in fact introduced upon the trial as the ground of his conviction.

3. If it be suggested that the defendant may have written many letters addressed like the one in question (allegations of time being immaterial), and therefore could not know which one was referred to in the indictment (*Floren* v. *United States*, 186 F. R. 961), we respond that he could by a motion for a bill of particulars have cleared up any uncertainty (if any existed) and been informed of the precise letter he was charged with mailing. Having failed to do so, it is now too late to complain. (*Shaw* v. *United States*, 180 F. R. 348, 352.)

In *Rosen* v. *United States*, 161 U. S. 29, 35, 41, a man was indicted for sending a newspaper through the mails. He objected that he could not tell what parts were claimed to be objectionable. The court said:

> And if he wished to be informed, before entering upon the trial, what particular parts of the paper would be relied on as bringing the case within the statute, he could, as already suggested, have applied for a bill of particulars, which the court, in the exercise of a sound legal discretion, might have granted or refused as the ends of justice required * * *.
>
> But, as we have already said, the defendant did not ask for a bill of particulars nor object to the indictment as insufficient, but made his defense upon the broad ground that the paper that he caused to be deposited in the post office was not obscene, lewd, or lascivious.

In *Durland* v. *United States*, 161 U. S. 306, 315, it was objected that the letters were not sufficiently identified. The court said:

> There was a partial identification of the letters by the time and place of mailing, and the charge was that defendant "intending in and for executing such scheme and artifice to defraud and attempting so to do, placed and caused to be placed in the post office," etc. This, it will be noticed, is substantially the language of the statute. If the defendant had desired further specification and identification, he could have secured it by demanding a bill of particulars. *Rosen* v. *United States*, 161 U. S. 29.

4. The defendant objects that the indictment was not definite enough to enable the accused to take the opinion of the court by demurrer as to whether it charges a crime.

This objection must be regarded as disposed of by the cases in this court cited above. So far as the actual substance of the letter or book in question went, the court was in no better position in any of these cases to say from the face of the indictment that an offense was properly charged than it is in this.

The true analysis of this point cannot be better put than it was by Judge Blatchford in *United States* v. *Bennett*, 16 Blatch. 338, 351:

> We are unable to recognize the force of the suggestion, that the defendant, in the case of an indictment for depositing an obscene book in the mail, is entitled to take the opinion of the Court by demurrer, as to whether the matter alleged to be obscene is obscene. The suggestion referred to has never been regarded, in the American cases, as of sufficient weight to lead to a following of the present English rule. The true view, we think, is, that if, in a case like the present one, any question can be raised to the Court, it can only be the question whether, on the matter alleged to be obscene, a verdict that it is obscene would be set aside as clearly against evidence and reason. This question can be fully raised before the trial, by a motion to be made on the indictment and a bill of particulars. Under all other circumstances, it is for the

jury to say whether the matter is obscene or not. (See *Commonwealth* v. *Landis*, 8 Phila., 453.)

5. The defendant urges that the imperfect identification of the letter opens an avenue for the district attorney to indict him on *one* letter and then *try* him on another.

That is an after thought. It does not appear to have been raised at the trial, nor any objection made to the introduction of the letter in evidence upon the ground that it was not the same letter on which the indictment was found. There is no pretense of any such substitution. It is merely argued as a possibility.

The mere possibility that a district attorney might do an illegal or wrongful act is hardly ground for holding the indictment bad.

But of course it is not intended to suggest that all identification can be dispensed with. (See *Grimm* v. *United States*, 156 U. S. 604, 608.) There must be some identification, whether because of one or more of the above grounds or all. But the point is that from the nature of the offense of mailing obscene matter a peculiar rule has arisen in these special cases. The result of the rule established in the interest of the purity of the record is almost, if not quite, to qualify the usual rule as to the strictness of description in an indictment.

It cannot be denied that there is *some* identification of the letter in this case. The address on the envelope is set out with exactness; the date on which

it was alleged to be mailed; and the contents are alleged to be obscene, etc. The ultimate objection is that there is no precise description of the contents of the letter.

Under the peculiar rule in these cases the degree of particularity with which the matter alleged as obscene could be set out must depend upon the nature of that feature. (See *Rosen* case, 161 U. S. at p. 38.) Unless an arbitrary line is to be drawn, the logic of these cases is that, having gone so far as to permit an omission of the contents, or even a short paraphrase of the obscene matter relied on, and a substitution therefor of the general allegation that the matter is obscene, it is not necessary to do more than give a very general reference to it for identification. This is so, because it may well be true, and as a matter of fact often is, that a letter (*i. e.*, the enclosure in the envelope) is entirely without date mark, heading, or other innocent identifying feature, and that the contents are so wholly indecent that no description or paraphrase (other than to say that it is obscene, etc.) could be made without itself carrying into the indictment the indecent idea or suggestion which is the basis of the charge, for it is peculiarly with ideas or mental conceptions that this statute deals. Since, then, the rule requires the record itself to be clean; since within the rule a letter might well be actually incapable of other description than the single allegation that it is lewd, obscene, etc.; since there is nothing in the record to show that the letter here in question is not of such a character; and since the

question "whether the matter was too obscene to be set forth in the record was a matter primarily to be considered by the district attorney in preparing the indictment; and, in any event, it was within the discretion of the court to say whether it was fit to be spread upon the records or not" (*Dunlop* v. *United States*, 165 U. S. 486, 497), it follows that this indictment must be sustained.

In *Price* v. *United States*, 165 U. S. 311, 315, it is said:

> There is no danger of the defendant in such case being deprived of any of his just rights by holding the indictment to be good. If there were any defect at all in such an indictment it should, as was stated in the *Rosen case*, be regarded after verdict as one of form under section 1025 of the Revised Statutes, providing that the proceedings on an indictment found by a grand jury in any District, Circuit or other court of the United States, shall not be affected "by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

CONCLUSION.

As a matter of safe practice, it would be preferable in describing in an indictment the obscene matter to identify it more definitely than was done here, as, for example, by giving the first or last words (if they were not themselves obscene), or something of that kind, or an identification mark or signature by the foreman or district attorney. But when it comes,

for example, to an obscene picture or instrument to prevent conception it would be very difficult to describe it at all.

Dealing with this specific case, it seems that no injustice has in fact been done the defendant, and unless this court feels that, as a matter of fundamental right, the obscene matter should be, in some way, specifically identified, this case should be affirmed.

It must be remembered that any decision here will not establish a principle of law applying to indictments generally, but only to those relating to obscene matter, concerning which a special and very exceptional rule exists by reason of the peculiar nature of the offense and its relation to setting it forth in full on the records of the court.

The judgment should be affirmed.

WM. MARSHALL BULLITT,
Solicitor General.

27 DECEMBER, 1912.

○